
# Effective Motions Practice
# New IJ Training 2018

# Purpose Of This Training

- Provide an understanding of the types of motions filed in Immigration Court and how to address them
- Identify the limitations that apply to motions to reconsider and reopen
- Discuss exceptions to limitations on motions and how to analyze whether motions fall within those exceptions
- Identify resources to assist you in adjudicating motions

# Main Issues We Will Cover

- Basic Motions Practice before the Immigration Courts, *see* Immigration Court Practice Manual ("ICPM") and Operating Policy and Procedure Memoranda ("OPPMs")
  - Pre-decision Motions
  - Post-decision Motions
- Law (statute, regulations and BIA cases) related to motions and exceptions to limitations on motions including the IJ's sua sponte authority

# Motions - Basics

- Only an alien who is in proceedings before the Immigration Court or the DHS may file a motion.
- An IJ has no authority over a motion if a charging document has not been filed with the Immigration Court (except for custody redetermination).
- If an IJ has already decided a case, and no appeal has been filed, the IJ has jurisdiction over a subsequently-filed motion.
- Statements made by counsel in a motion are not evidence. *See INS v. Wang*, 450 U.S. 139, 143 (1981) (finding unsupported statements by counsel or the alien in the motion have no evidentiary value).
- Substance and not label of motion controls.
- Parties are strongly discouraged from filing compound motions, which are motions that combine two separate requests.

# Types Of Pre-decision Motions Before The Court

- Motion to Continue
- Motion to Advance Hearing/Expedite
- Motion to Change Venue
- Motion to Substitute or Withdraw as Counsel
- Motion for Telephonic or Waiver of Appearance
- Motion to Administratively Close
- Motion to Dismiss/Terminate
- Motion to Pretermit Application for Relief
- Motion for Subpoena and/or Deposition
- Motion to Suppress
- Motion to Sever/Consolidate
- Motion for Telephonic Witness Testimony
- Motion to Amend

# Types Of Post-decision Motions Before The Court

- Motion to Reconsider
- Motion to Reopen
  - Motion to Reopen and Rescind In Absentia Order
- Motion to Reissue
- Motion to Amend
- Motion to Recalendar

# Pre-decision Motions - Responses

A motion is deemed unopposed unless a timely response is made. 8 CFR § 1003.23(a); *see also* Immigration Court Practice Manual ("ICPM"), Chapter 5.12.

- IJs may set and extend time limits for the making of motion and replies. 8 CFR § 1003.23(a).
- IJ may deny a motion before the close of the response period without waiting for a response from the opposing party if the motion does not comply with the applicable legal requirements.

*Note*: An application, motion, or document is not deemed "filed" until it is received by the Immigration Court. All submissions received by the Immigration Court are date-stamped on the date of receipt. ICPM Chapter 3.1(c) (Must be "timely").

# Filing Deadlines - Non-Detained Masters

- For non-detained master calendar hearings, any filing (including a motion) must be submitted at least 15 days prior to the hearing if the party is requesting a ruling prior to or at the hearing; any response must be submitted within 10 days after the original filing.

- If the submission is less than 15 days prior to the master calendar hearing, the response may be presented orally or in writing at the hearing. *See* ICPM, Chapter 3.1(b)(i)(A).

# Filing Deadlines - Non-Detained Individuals

For non-detained individual calendar hearings, any filing (including a motion) must be submitted at least 15 days prior to the hearing; any response must be submitted within 10 days after the original filing. *See* ICPM, Chapter 3.1(b)(ii)(A).

# Filing Deadlines - Detained

For master calendar and individual calendar hearings involving detained aliens, filing deadlines are specified by the Immigration Court. *See* ICPM, Chapter 3.1(b)(i)(B), (ii)(B).

# Motions To Continue - Basics

"The Immigration Judge may grant a continuance for good cause shown." 8 C.F.R. § 1003.29. *see also* 8 CFR § 1240.6 (providing that the IJ may grant a reasonable adjournment either at his or her own instance or, for good cause shown, upon application by the respondent or the DHS).

- For appellate purposes, the decision to grant or deny is within the sound discretion of an IJ, and the IJ's decision will not be reversed unless the alien demonstrates that denial caused "actual prejudice and harm and materially affected the outcome of his case." *Matter of Sibrun*, 18 I&N Dec. 354, 356-57 (BIA 1983).
- IJ must make the reason for adjournment clear on the record (either orally or in decision) and annotate worksheet with corresponding code. See Operating Policies and Procedures Memorandum ("OPPM") 17-01, regarding Continuances. Examples of common continuance codes: 01, 02, 04, 12, 17, 34, 35, 38.

# Motions To Continue

- Pending post-conviction motions generally do not constitute good cause for a continuance because they do not negate the finality of the conviction for immigration proceedings. *See generally Matter of Madrigal*, 21 I&N Dec. 323 (BIA 1996); *Matter of Adetiba*, 20 I&N Dec. 506, 508 (BIA 1992).
- It is not error for an IJ to deny continuance request for alien to pursue deferred action status from DHS. *See Matter of W-Y-U-*, 27 I&N Dec. 17, 19-20 (BIA 2017) (holding that DHS has "exclusive jurisdiction" over prosecutorial discretion and cautioning against "unreasonable delay" in adjudication of removal proceedings).
- An IJ should generally not continue a case solely for an alien to demonstrate rehabilitation from criminality for relief purposes, because doing so defeats the purpose of instituting proceedings as soon as possible after a conviction. *See Matter of Silva-Rodriguez*, 20 I&N Dec. 448 (BIA 1992).

# Motions To Continue - Considerations

An unopposed motion to continue to await USCIS adjudication of a pending family or employment-based visa petition (Forms I-130/I-140) should be generally granted if its approval would render alien prima facie eligible for adjustment of status. *Matter of Hashmi*, 24 I&N Dec. 785, 794 (BIA 2009); *Matter of Rajah*, 25 I&N Dec. 127 (BIA 2009). *But see Matter of L-A-B-R-*, 27 I&N Dec. 245 (A.G. 2018) (AG reviewing whether good cause exists to grant continuance for a collateral matter to be adjudicated).

# Motions To Continue - *Hashmi* Factors

IJs must "articulate, balance, and explain" all relevant factors in determining whether to deny continuance request -- failure to provide a reason is an abuse of discretion. *Matter of Hashmi*, 24 I&N Dec. 785, 794 (BIA 2009). Factors to be considered with respect to immigrant relative and employment-based visa petitions include:

(1) the DHS response to the motion to continue;

(2) whether the underlying visa petition is prima facie approvable;

(3) the alien's statutory eligibility for adjustment of status;

(4) whether the application for adjustment of status merits a favorable exercise of discretion; and

(5) the reason for the continuance and other relevant procedural factors.

# Motions To Continue - "U" Non-immigrant Visas

In determining whether to continue for adjudication of pending "U" nonimmigrant visa, an IJ should consider:

(1) DHS's response to alien's motion to continue;

(2) whether the underlying visa is prima facie approvable; and

(3) the reason for the continuance and other procedural factors. *Matter of Sanchez-Sosa*, 25 I&N Dec. 807 (BIA 2012).

# Motions To Continue - "U" Non-immigrant Visas

- To show prima facie eligibility for a U visa, an alien must have suffered substantial physical or mental abuse as the innocent victim of a qualifying crime for which the alien has been, is being, or will be helpful to law enforcement, which ordinarily requires an approved law enforcement certification.
- An alien who has filed a prima facie approvable petition for a U visa with USCIS will usually warrant a favorable exercise of discretion for a continuance.

# Motions To Continue - "U" Non-immigrant Visas

- Good cause to continue will ordinarily not be shown if a law enforcement certification has not been approved, absent DHS support or other compelling circumstances.

- If an alien is inadmissible, such as due to crimes, an IJ should assess the likelihood that USCIS will exercise its discretion favorably.

# Motions To Continue - Other Considerations

- Case completion goals alone are not a legitimate basis to deny continuance.
- An IJ can consider the number and length of continuances previously granted.
- DHS responses should be evaluated, but its opposition alone is insufficient to deny motion for continuance.
- IJs may ask to see applications, documents, and any required waivers to evaluate if the respondent is prima facie eligible for adjustment of status.
- Delay not attributable to the respondent augurs in favor of granting continuance.

# Motions To Advance

- Motions to advance are generally disfavored, but may be appropriately filed when there is imminent ineligibility for relief or there is a health crisis necessitating immediate IJ action. *See* ICPM, Chapter 5.10(b).

- Such motions are also commonly filed when an alien wishes to withdraw all applications for relief and seeks to depart voluntarily within a specific time frame.

# Motions To Change Venue (COV)

"The Immigration Judge, for good cause, may change venue only upon motion by one of the parties, and after the charging document has been filed with the Immigration Court." 8 C.F.R. §1003.20(b).

- A motion (oral or written) may be granted only after the other party has been given notice and an opportunity to respond. See OPPM 18-01: Change of Venue; *cf.* ICPM Chapter 5.10(c) (requiring a written order).
- IJ must issue a written order on the motion for COV and annotate the worksheet and indicate whether hearing in new court is a master or individual hearing and give appropriate advisals to respondent. See OPPM 18-01: Change of Venue.
- Law of the case doctrine generally applies to rulings made prior to transfer. See OPPM 18-01.

# Motions To Change Venue

The motion should be made in writing and supported by evidence, and should contain the following information:

(1) date and time of next hearing;

(2) an admission or denial of the factual allegations and charge(s) contained in the Notice to Appear;

(3) a designation or refusal to designate a country of removal;

(4) a description of the basis for eligibility;

(5) the address and telephone number of the location at which the respondent will be residing if the motion is granted;

(6) if the address at which the alien is receiving mail has changed, a properly completed Alien's Change of Address Form, Form EOIR-33/IC); and

(7) a detailed explanation of the reasons for the request.

ICPM Chapter 5.10(c).

# Motions To Change Venue

- It is not unreasonable for an IJ to deny a motion to change venue when issues of removability have not yet been resolved.

- The decision to grant is discretionary. Various factors to consider include: administrative convenience; expeditious treatment of case; location of witnesses; cost of transporting witnesses or evidence to a new location; alien's place of residence. *Matter of Rahman*, 20 I&N Dec. 480 (BIA 1992).

- The mere fact an alien wishes to reside in another city does not generally outweigh DHS opposition, particularly if DHS can establish prejudice. *Matter of Rahman*, 20 I&N Dec. at 484.

# Motions To Change Venue

- Prejudice to DHS with respect to cost of transporting witnesses to hearing is a relevant factor to consider. *Matter of Rivera*, 19 I&N Dec 688, 690 (BIA 1988).

- Accommodation of alien's choice of distant counsel is not required, especially when it has not been established that local counsel is unavailable. *Matter of Rahman*, 20 I&N Dec. at 484.

- The mere filing of a motion to change venue does not relieve the respondent of his obligation to appear. ICPM Chapter 5.10(c).

# Motions To Consolidate or Sever

- IJ has the implicit authority to consolidate or sever the cases of different respondents to promote administrative efficiency. 8 C.F.R. § 1003.10(b). *Matter of Taerghodsi*, 16 I&N Dec. 260 (BIA 1977).

- Consolidation is generally limited to cases involving immediate family members. The Practice Manual presumes consolidation only upon filing of motion by a party. ICPM, at Chapter 4.21(a). An IJ may similarly sever cases in the exercise of discretion upon the filing of a motion by a party. ICPM, at Chapter 4.21(b).

# Motions For Substitution Of Counsel

- Motions may be made orally or in writing, accompanied by Notice of Entry of Appearance of Attorney or Representative, Form EOIR-28.
- Written motions should include: (1) the reasons for the substitution of counsel; (2) evidence that prior counsel has been notified about the motion; and (3) evidence of the alien's consent to the substitution of counsel.
- IJs should consider reasons for the motion, and length of time prior to next scheduled hearing (continuances based on substitution of counsel are not favored). See ICPM Chapter 2.3(i)(i).
- There is no need for prior counsel to file motion to withdraw if motion to substitute is granted, however, until such motion is granted the original counsel remains the attorney of record.

# Motions To Withdraw As Counsel

- May be made orally or in writing and must be filed when an attorney wishes to withdraw as counsel when the alien has not obtained new counsel.

- IJs should consider time remaining before next hearing and the reasons given for the motion. Until the motion is granted, counsel remains attorney of record and must attend hearings.

# Motions To Withdraw As Counsel

Written motions should include:

(1) the reasons for withdrawal;

(2) the last known address of the alien;

(3) a statement that the attorney has notified the alien of the request to withdraw or, if alien could not be notified, an explanation of the efforts made to notify the alien;

(4) evidence of the alien's consent to withdraw or a statement as to why evidence of consent is not obtainable; and

(5) evidence that the attorney notified, or attempted to notify, the alien of pending deadlines, time and location of next hearing, the necessity of meeting deadlines and appearing at hearings and the consequences of failing to do so. *See Matter of Rosales*, 19 I&N Dec. 655 (BIA 1988); *see also* ICPM 2.3(i)(ii).

# Motions To Administratively Close

- Administrative closure has been an important, well-established, and longstanding procedure in Immigration Court proceedings.
- The Board viewed the administrative closure of proceedings as an administrative convenience which allows the temporary removal of cases from the docket in certain situations. *Matter of Avetisyan*, 25 I&N Dec. 688 (BIA 2012) (weighing various factors, including opposition by either party).
- The Attorney General overruled the Board's precedent decision in *Avetisyan* and any related precedent in *Matter of Castro-Tum*, 27 I&N Dec. 271 (A.G. 2018).

# *Matter of Castro-Tum*

- Immigration Judges and the Board exercise only the authority provided by statute and delegated by the Attorney General.

- There is no statute providing for administrative closure and the Department's regulations provide for administrative closure only in specific categories of cases.

- The Attorney General declines to exercise his general authority to permit administrative closure. Thus, administrative closure is appropriate only for cases in which it is authorized by regulation or a judicially approved settlement.

- All other cases shall be recalendared upon motion by either party.

# Motions For Subpoenas And Depositions

- If an IJ is satisfied that a witness is not reasonably available at the place of hearing and that the testimony of such witness is essential, the IJ may order the taking of a deposition. The order shall designate the official by whom the deposition shall be taken, may prescribe and limit the content, scope, or manner of taking the deposition, and may direct the production of documentary evidence. 8 C.F.R. § 1003.35(a).
- An IJ has exclusive jurisdiction to issue subpoenas requiring the attendance of witnesses or for the production of evidence, or both. The subpoena may be issued on the IJ's own volition or upon application of a party. 8 C.F.R. § 1003.35(b)(1). ICPM Chapter 4.20.

# Motions For Subpoenas And Depositions

- If a party seeks a subpoena, he or she must state in writing or at the hearing, what is expected to be proven, and the party must show affirmatively that diligent efforts were made, without success, to produce the same. 8 C.F.R. § 1003.35(b)(2).

- Upon being satisfied that the witness will not appear to testify or produce evidence and the testimony or evidence is "essential," the IJ "shall" issue a subpoena. 8 C.F.R. § 1003.35(b)(3).

- The subpoena recipient must be over age 18. 8 C.F.R. § 1003.35(b)(5).

# Motions For Subpoenas And Depositions

- If a subpoena is ignored, the IJ "shall request" the United States Attorney for the district in which the subpoena was issued to report such neglect or refusal to the United States District Court and to request such court to issue an order requiring the witness to appear and testify and to produce evidence. 8 C.F.R. § 1003.35(b)(6).

- In practical terms, an IJ would consult with an ACIJ and the Office of the General Counsel.

# Motions To Suppress

- The test for admissibility of evidence is whether it is probative and its use must be fundamentally fair so as not to deprive an alien of due process of law.

- Although evidence seized during an illegal arrest may be suppressed in a criminal proceeding, the mere fact of an illegal arrest has no bearing on a subsequent immigration proceeding.

# Motions To Suppress

- Absent any indication DHS's Record of Deportable/Inadmissible Alien (Form I-213) contains information that is incorrect or was obtained by coercion or duress, such document is inherently trustworthy and admissible to prove alienage and removability.

- One who raises a claim questioning the legality of evidence must come forward with proof establishing a prima facie case before DHS will be called upon to justify the manner in which it obtained the evidence.

# Additional Pre-decision Motions

- Motion for Extension
- Motion to Accept Untimely Filing
- Motion for Closed Hearing
- Motion to Waive Representative's/Respondent's Appearance
- Motion to permit Telephonic Appearance
- Motion to Request an Interpreter
- Motion for Video Testimony
- Motion to present Telephonic Testimony
- Motion to Sever/Consolidate
- Motion to Recuse

# Additional Pre-decision Motions

- Motion to Dismiss/Terminate Proceedings. 8 C.F.R. §§ 1239.2(c), (f). *See, e.g., Matter of J-A-B- & I-J-V-A-*, 27 I&N Dec. 168 (BIA 2017); *Matter of Sanchez-Herbert*, 26 I&N Dec. 43, 45 (BIA 2012); *Matter of G-N-C*, 22 I&N Dec. 281 (BIA 1988) (IJ authority to terminate).

- Motion to Pretermit Application for Relief due to lack of statutory eligibility. *See, e.g., Matter of Velasquez*, 25 I&N Dec. 278 (BIA 2010).

# POST-DECISION MOTIONS

- Motion to Reconsider
- Motion to Reopen
  - Motions to Reopen and Rescind In Absentia Order
- Motion to Reissue
- Motion to Amend
- Motion to Recalendar
- Sua Sponte Authority to Reconsider or Reopen

# Motions To Reconsider

- The motion must be in writing and signed by the affected party or attorney of record. 8 C.F.R. § 1003.23(b)(1)(i).
- The motion shall state whether the validity of the removal order is subject to any judicial proceedings and, if so, the nature and date thereof, the court in which such proceedings took place or is pending, and its result or status.
- An EOIR-28, Notice of Entry of Appearance, must be filed unless DHS is the moving party. 8 C.F.R. § 1003.23(b)(1)(ii).
- A motion can be reassigned to another IJ if the original IJ is not available. 8 C.F.R 1003.23(b)(1)(iii).
- IJs may set and extend deadlines for replies. A motion is deemed unopposed unless a timely response is made. 8 C.F.R. § 1003.23(b)(1)(iv).

# Motions To Reconsider

- Only one motion to reconsider is allowed. INA § 240(c)(6)(A); 8 C.F.R. § 1003.23(b)(1).
- The motion must be filed within 30 days of the date of entry of a final administrative order. INA § 240(c)(6)(B); 8 C.F.R. § 1003.23(b)(1).
- A motion to reconsider asserts that the IJ made a factual or legal error at the time IJ rendered the previous decision. INA § 240(c)(6)(C); 8 C.F.R. § 1003.23(b)(2).
- IJ may reconsider any case in which he or she has made a decision. 8 C.F.R. § 1003.23(b)(1).

# Motions To Reconsider

- Any departure, including removal, deportation, or exclusion for the United States shall constitute withdrawal of the motion. 8 C.F.R. § 1003.23(b)(1).
- *But see Matter of Bulnes*, 24 I&N Dec. 57 (BIA 2009) (holding that an alien's departure from the United States while under an outstanding order of deportation or removal issued in absentia does not deprive the IJ of jurisdiction to rescind the order if premised on lack of notice).

*Note*: Circuit courts have significantly limited the applicability of the departure bar and *Matter of Armendarez*, 24 I&N Dec. 646 (BIA 2008). Check law in your circuit.

# Motions To Reconsider

- A response is due within 10 days after the motion is received by the Immigration Court. See ICPM Chapter 3.1(b)(iv).
- No automatic stay applies, unless the motion involves in absentia order. 8 C.F.R. § 1003.23(b)(v).
- The motion must specify errors of fact or law and "shall" be supported by pertinent authority. 8 C.F.R. § 1003.23(b)(2).
- A party may not seek reconsideration of a prior denial of a motion to reconsider.
- A party may not submit new evidence with the motion.

# Motions To Reopen

- A motion to reopen seeks to reopen proceedings so that new evidence can be presented and a new decision entered on a different factual record, normally after a further evidentiary hearing.

  INA § 240(c)(7)(B); 8 C.F.R. § 1003.23(b)(1).
- Only one motion to reopen is allowed unless exception applies. INA § 240(c)(7)(A); 8 C.F.R. § 1003.23(b)(1); or if filed before 9/30/96.
- A motion must be filed within 90 days of the date of a final administrative order. INA § 240(c)(7)(C)(i); 8 C.F.R. § 1003.23(b)(1).

# Motions To Reopen

- An IJ may, upon his or her own motion, reopen any case in which he or she has made a decision unless jurisdiction has vested with the Board. Proceedings should be reopened *sua sponte* only under "exceptional" circumstances.
- When a motion to reopen is opposed by either party, the IJ must state in writing the reasons for the decision.
- A response to a motion to reopen to rescind an in absentia order in removal proceedings is due within 10 days after the motion was received by the Immigration Court, unless otherwise specified by the IJ. See ICPM, Chapter 5.9(d)(ii)(C).

# Motions To Reopen

- Any departure, including removal, deportation, or exclusion for the United States shall constitute withdrawal of the motion. *See generally Matter of Okoh*, 20 I&N Dec. 864 (BIA 1994); *but see Matter of Bulnes*, 24 I&N Dec. 57 (BIA 2009) (holding that an alien's departure from the United States while an under an outstanding order of deportation or removal issued in absentia does not deprive the IJ of jurisdiction to rescind the order if premised on lack of notice).

*Note*: Circuit courts have significantly limited the applicability of the departure bar and *Matter of Armendarez*, 24 I&N Dec. 646 (BIA 2008). Check law in your circuit.

# Motions To Reopen

- A motion must be in writing and signed by the affected party or attorney of record. 8 C.F.R. § 1003.23(b)(1)(i).
- The motion shall state whether the validity of removal order is subject to any judicial proceedings and, if so, the nature and date thereof, the court in which such proceedings took place or is pending, and its result or status.
- An EOIR-28, Notice of Entry of Appearance, must be filed unless DHS is the moving party. 8 C.F.R. § 1003.23(b)(1)(ii).
- A motion can be reassigned to another IJ if the original IJ is not available. 8 C.F.R § 1003.23(b)(1)(iii).

*Note*: Reassigned IJ must state for the record that she has familiarized herself with the record of proceedings. 8 C.F.R. § 1240.1(b).

# Motions To Reopen

- IJs may set and extend deadlines for filings of responses. A motion is deemed unopposed unless a timely response is made. 8 C.F.R. § 1003.23(b)(1)(iv).
- A response is due within 10 days after the motion is received by the Immigration Court. See ICPM, Chapter 3.1(b)(iv).
- No automatic stay applies, unless motion involves in absentia order. 8 C.F.R. § 1003.23(b)(v).

# Motions To Reopen

- The motion "shall" state new facts to be proven at the hearing if the motion is granted and "shall" be supported by affidavits and other evidentiary material. 8 C.F.R. § 1003.23(b)(3).
- If seeking new relief, the alien must submit applications. 8 C.F.R. § 1003.23(b)(3).
- If granting, an IJ must find the evidence to be material and not previously available and could not have been discoverable or presented at prior hearing.

# Motions To Reopen

- In seeking to reopen removal proceedings, the burden is upon the moving party to establish that reopening is warranted.
- What must be proven and the standard of proof varies depending upon the basis for the motion. *Compare Matter of Coelho*, 20 I&N Dec. 464 (BIA 1992) (alien who has already had hearing on merits of relief bears "heavy burden" of showing new evidence "would likely change the result in the case") *with Matter of M-S-*, 22 I&N Dec. 349 (BIA 1998) (alien who is motioning for previously unavailable relief need present sufficient evidence to show "a reasonable likelihood of success on the merits.") and *Matter of L-O-G-*, 21 I&N Dec. 413 (BIA 1996) (same).

# Motions To Reopen

- IJs cannot grant motion to reopen to apply for discretionary relief if it appears that the alien's right to apply for relief was fully explained by the IJ and an opportunity was given to the alien to apply, unless the relief sought involved circumstances occurring after the hearing.
- IJs may deny a motion in the exercise of discretion even if the alien has established prima facie eligibility for new relief. such relief, or that such relief was not available at the time of the original hearing. *See INS v. Doherty*, 502 U.S. 314, 324, 327 (1992)); *INS v. Abudu*, 485 U.S. 94, 111 (1988).

# Exceptions To The Time And Number Limitations

- Motions to Reopen and Rescind a prior In Absentia Order of removal, deportation or exclusion
- Joint Motions
- DHS Motion Based on Fraud/Crime
- Motions to Reopen to Apply/Reapply for Asylum, Withholding of Removal or Protections under the Convention Against Torture
- Motions to Reopen due to Ineffective Assistance of Prior Representative and Equitable Tolling
- Motions to Reopen under the Violence Against Women Act (VAWA)
- Other Special Motions
- Sua Sponte Authority

# Motions to Reopen to Rescind In Absentia Order of Removal

- An alien in removal proceedings must file a motion to rescind an order of removal entered in absentia within 180 days of the date of the order if he or she seeks to demonstrate exceptional circumstances for failure to appear. INA § 240(e)(1); 8 C.F.R. § 1003.23(b)(ii).
- A motion may be filed at any time, if the basis is lack of proper notice or if the alien was in federal or state custody and the failure to appear was through no fault of the alien. This applies to cases in which service of the Notice to Appear occurs after April 1, 1997. INA § 240(b)(5) of the Act; 8 C.F.R. § 1003.23(b)(4)(ii).

# Motions to Reopen to Rescind In Absentia Order of Removal

- An alien ordered removed in absentia must file a motion to reopen with the IJ; the alien cannot file a direct appeal of the order to the Board (though a party may file an appeal from the IJ's decision on the motion to reopen).
- The filing of a motion based either on notice or exceptional circumstances serves as an automatic stay of removal until the IJ issues a decision. INA § 240(b)(5); 8 C.F.R. § 1003.24(b)(4)(ii).

# Motions to Reopen to Rescind In Absentia Order of Deportation – Section 242B

- Deportation proceedings – Section 242B: Applies to deportation proceedings when an Order to Show Cause (Form I-221) is served after June 13, 1992 (but before April 1, 1997). Alien may file a motion to rescind an in absentia order of deportation within 180 days of the IJ's order if exceptional circumstances are demonstrated, or at any time if proper notice was not received.

# Motions to Reopen to Rescind In Absentia Order of Deportation - 242B

- In deportation proceedings, alien must file motion to reopen in absentia order within 180 days, 8 C.F.R. § 1003.23(b)(4)(iii)(A)(1), or at any time if based on lack of notice or if alien was in federal or state custody at the time of the hearing. 8 C.F.R. § 1003.23(b)(4)(iii)(A)(2).
- The filing of such motion provides the alien with an automatic stay of deportation. 8 C.F.R. § 1003.23(b)(4)(iii)(C). Time and number limitations do no apply. 8 C.F.R. § 1003.23(b)(4)(iii)(2)(D).

# Motions to Reopen and Rescind In Absentia Order in Deportation and Exclusion prior to June 13, 1992

In exclusion and in "old" section 242(b) deportation (OSC issued prior to June 13, 1992) proceedings, an alien need only show "reasonable cause" for failing to appear. 8 C.F.R. § 1003.23(b)(4)(iii)(B).

Time and number limitations do not apply.

# When Ordinary Time and Number Limitations Do Not Apply – Joint Motions

- There are no time or number limitations for motions to reopen "agreed upon by all parties and jointly filed."
  8 C.F.R. § 1003.23(b)(4)(iv).

# When Ordinary Time and Number Limitations Do Not Apply – DHS motion

- Time and number limitations on motions do not apply if DHS brings a motion based on fraud in the original proceeding or a crime that would support termination of asylum. *See* 8 C.F.R. § 1003.2(c)(3)(iv).

# When Ordinary Time and Number Limitations Do Not Apply – Asylum, WH, CAT

- Time and number limitations on motions do not apply if an application for asylum, withholding, or protection under the United Nations Convention Against Torture is based on changed country conditions in the country of return or to where the alien was ordered removed, if the evidence is material and not previously discoverable. INA § 240(c)(7)(C)(ii); 8 C.F.R. § 1003.23(b)(4)(i).
- Changes in an alien's personal circumstances do not provide a basis to file a successive or untimely asylum application.

# When Ordinary Time and Number Limitations Do Not Apply –Equitable Tolling

- Most jurisdictions allow for some form of equitable tolling of the statutory and regulatory limitations on motions as they are not jurisdictional.
- Generally, equitable tolling is available "when a petitioner is prevented from filing because of deception, fraud, or error, as long as the petitioner acts with due diligence in discovering the deception, fraud, or error." *Iturribarria v. INS*, 321 F.3d 889, 897 (9th Cir. 2003).

# When Ordinary Time and Number Limitations Do Not Apply –Equitable Tolling

- Diligence - The threshold issue is whether the alien has established due diligence in pursuing the case during the time sought to be tolled.
- Prejudice – Circuit courts generally require that prejudice be shown in order to establish that equitable tolling of the time and number limits are warranted.

*Note*: different circuits have slightly different standards of prejudice – use circuit specific language

# When Ordinary Time and Number Limitations Do Not Apply – Ineffective Assistance of Counsel (IAC)

- If the alien establishes due diligence to toll the deadline, and there appears to have been prejudice, then explore whether the alien has met the procedural requirements for showing ineffective assistance of counsel under *Matter of Assaad*, 23 I&N Dec. 553 (BIA 2003) and *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988)
  - (1) submit an affidavit explaining his agreement with former counsel regarding his legal representation, (2) present evidence that prior counsel has been informed of the allegations against her and given an opportunity to respond, (3) either show that a complaint against prior counsel was filed with the proper disciplinary authorities or explain why no such complaint was filed.

# When Ordinary Time and Number Limitations Do Not Apply – Violence Against Women Act (VAWA)

- Removal – a battered spouse, parent or child who is physically present in the United States must file a VAWA motion to reopen for adjustment (based on a self-petition) or special rule cancellation within one year of the entry of the final administrative order of removal. INA §§ 240(c)(7)(A), (c)(iv).
- Exception to time and number limitations: If an alien can establish extraordinary circumstances or extreme hardship to his or her child.
- Deportation/Exclusion – No time or number limitations for a VAWA motion apply. INA § 240, n. 1.

# When Ordinary Time and Number Limitations Do Not Apply – Special Motions

Most of the deadlines for pursuing these benefits have expired but a motion to seek such relief may be subject to equitable tolling or sua sponte reopening.

- Nicaraguan and Cuban Adjustment under § 202 of NACARA
  - Deadline for filing motion for adjustment of status: June 19, 2001; 8 C.F.R. § 1003.43(e)(1); see, e.g., *Albillo-De Leon v. Gonzales*, 410 F.3d 190 (9th Cir. 2005).
- Nicaraguan and Cuban Cancellation under § 203 of NACARA
  - Motion must have been filed between January 16, 1998 and September 11, 1998; applicants had until November 18, 1999 to supplement the motion. ; 8 C.F.R. § 1003.43(e); see, e.g., *Albillo-De Leon v. Gonzales*, 410 F.3d 190 (9th Cir. 2005).

# When Ordinary Time and Number Limitations Do Not Apply – Special Motions

Most of the deadlines for pursuing these benefits have expired but a motion to seek such relief may be subject to equitable tolling or sua sponte reopening.

- LIFE Act Motions
  - Section 1505(c)of the LIFE Act; 8 C.F.R. § 1003.43(f). An alien denied section 203 NACARA benefits based on INA 241(a)(5) (reinstatement of removal orders), may file a motion to reopen for such relief before October 16, 2001.
- 212(c) Motions
  - Regulations published subsequent to Supreme Court decision in *INS v. St. Cyr*, to allow eligible applications to file a motion for 212(c) relief. 8 C.F.R. § 1003.44(h) provides the deadline for filing a 212(c) motion is April 26, 2005.

# Sua Sponte Authority to Reconsider or Reopen

"An Immigration Judge may upon his or her own motion at any time, or upon motion of the [DHS] or the alien, reopen or reconsider any case in which he or she has made a decision, unless jurisdiction is vested with the Board of Immigration Appeals." 8 C.F.R. § 1003.23(b)(1).

- "catch-all" alternative – to be addressed in written or oral decision
- "Limited to exceptional circumstances and not meant to cure filing defects or circumvent the regulations" *Matter of J-J-*, 21 I&N Dec. 976 (BIA 1997).
- Changes in Law – *Matter of G-D-*, 22 I&N Dec. 1132 (BIA 1999) (change in law must be significant, fundamental change, not an incremental); *see also Matter of G-C-L-*, 23 I&N Dec. 359 (BIA 2002).
- Grant of Status by DHS
- Vacated Convictions – *see Padilla v. Kentucky*, 130 S.Ct. 1473 (2010); *see also Matter of Marquez Conde*, 27 I&N Dec. 251 (BIA 2018); *Matter of Chavez-Martinez*, 24 I&N Dec. 272 (BIA 2007); *Matter of Adamiak*, 23 I&N Dec. 878 (BIA 2006).

# Miscellaneous Post-decision Motions

- Motion to Reissue
  - generally treated as a motion to reopen
- Motion to Amend (essentially a motion to reconsider)
  - correct error in court's decision
- Motion to Recalendar
  - Motion is not subject to time and number restrictions; either party may seek to recalendar closed proceedings; ICPM Chapter 5.10(t).

# Resources

Immigration Court Practice Manual

Operating Policies and Procedures Memoranda (OPPMs)

OCIJ Guidance and Publications Pages

- Legal Outlines
  - Motion to Reopen Charts
  - Shifting Burdens of Proof
- Draft Decision Bank
- Published-Case-Summaries
- Circuit Court Guidance

9th Circuit Outline on Motions – available at httpcdn.ca9.uscourts.gov/datastore/uploads/immigration/immig_west/C.pdf:// (last updated Jan. 2018).


DEPARTMENT OF JUSTICE
QUI PRO DOMINA JUSTITIA SEQUITUR
Executive Office for Immigration Review

# EFFECTIVE MOTIONS PRACTICE
# 2018 New Immigration Judge Training

## MOTIONS – BASICS

- Only an alien who is in proceedings before the Immigration Court or the DHS may file a motion.
- An IJ has no authority over a motion if a charging document has not been filed with the Immigration Court (except for custody redetermination).
- If an IJ has already decided a case, and no appeal has been filed, the IJ has jurisdiction over a subsequently-filed motion.
- When a motion to reopen is opposed by either party, the IJ must state in writing the reasons for the decision. *Matter of Correa*, 19 I&N Dec. 130 (BIA 1984). This is a good practice to follow whenever any type of motion is opposed.
- Statements made by counsel in a motion are not evidence. *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).
- Substance and not label of motion controls. *Matter of Cerna*, 20 I&N Dec. 399 (BIA 1991).

## RESPONSES

- A motion is deemed unopposed unless a timely response is made. 8 C.F.R. § 1003.23(a); *see also Immigration Court Practice Manual*, Chapter 5.13; *cf.* 8 C.F.R. § 1003.2(g)(3) (stating that opposing party has 13 days to respond to a motion, and the motion is deemed unopposed if no timely response is made).
- For **non-detained master calendar** hearings, any filing (presumably including a motion) must be submitted at least 15 days prior to the hearing if the party is requesting a ruling prior to or at the hearing; any response must be submitted within 10 days after the original filing.
- If the submission is less than 15 days prior to the master calendar hearing, the response may be presented orally or in writing at the hearing. *See Immigration Court Practice Manual*, Chapter 3.1(b)(i)(A).
- For **non-detained individual calendar** hearings, any filing (presumably including a motion) must be submitted at least 30 days prior to the hearing; any response must be submitted within 10 days after the original filing**.** *See Immigration Court Practice Manual*, Chapter 3.1(b)(i)(B).
- For master calendar and individual calendar hearings involving **detained aliens**, filing deadlines are specified by the Immigration Court. *See Immigration Court Practice Manual*, Chapter 3.1(b)(i)(A), (B).

- A response to a motion to reopen to rescind an *in absentia* order in removal proceedings is due within **10** days after the motion was received by the Immigration Court, unless otherwise specified by the IJ. *See Immigration Court Practice Manual*, Chapter 5.9(d)(ii)(C) (Updated 10/20/17).

## MOTIONS TO CONTINUE

***See* Operating Policies and Procedures Memorandum (OPPM) 17-01, Continuances; it supplements and amends OPPM 13-01. Effective July 31, 2017.**

- "The Immigration Judge may grant a continuance for good cause shown." 8 C.F.R. § 1003.29.
- Lack of preparation: An alien "at least must make a reasonable showing that the lack of preparation occurred despite a diligent good faith effort to be ready to proceed and that any additional evidence he seeks to present is probative, not cumulative, and significantly favorable to the alien. *Matter of Sibrun*, 18 I&N Dec. 354, 356 (BIA 1983).
- For appellate purposes, the decision to grant or deny is within the sound discretion of an IJ, and the IJ's decision will not be reversed unless the alien demonstrates that denial caused "actual prejudice and harm and materially affected the outcome of his case." *Matter of Sibrun*, 18 I&N Dec. 354, 356-57 (BIA 1983).
- Pending post-conviction motions generally do not constitute good cause for a continuance because they do not negate the finality of the conviction for immigration proceedings. *See*, e.g., *Matter of Madrigal*, 21 I&N Dec 323, 327 (BIA 1996).
- An alien may seek deferred action status from DHS at any stage of the proceedings and it is not error for an IJ to deny continuance request for alien to pursue such relief. *Matter of Quintero*, 18 I&N Dec. 348 (BIA 1982).
- An IJ should generally not continue a case solely for an alien to demonstrate rehabilitation from criminality for relief purposes, because doing so defeats the purpose of instituting proceedings as soon as possible after a conviction. *Matter of Silva-Rodriguez*, 20 I&N Dec. 448 (BIA 1992); *see also Matter of Garcia-Reyes*, 19 I&N Dec. 830 (BIA 1988).
- The Attorney General is currently reviewing whether good cause exists to prant a continuance in order for a collateral matter to be adjudicated. *See Matter of L-A-B-R-*, 27 I&N Dec. 245 (A.G. 2018).

**Pending family-based visa petition**. An unopposed motion to continue to await USCIS adjudication of a pending family-based visa petition "should be generally be granted" if its approval would render alien *prima facie* for adjustment of status. Non-exhaustive list of factors to consider if good cause for continuance has been established include: (1) the DHS's response; (2) whether underlying visa petition is *prima facie* approvable; (3) the respondent's statutory eligibility for adjustment of status; (4) whether the respondent merits adjustment of status as a matter of discretion; (5) and the reason for the continuance and any other relevant procedural factors. *Matter of Hashmi*, 24 I&N 785 (BIA 2009).

- Case completion goals alone are not a legitimate basis to deny continuance to await adjudication of a pending visa petition. But, an IJ can consider the number and length of continuances previously granted for petition to be filed on the respondent's behalf.
- DHS responses should be evaluated, but its opposition alone is insufficient to deny motion for continuance.
- IJs may ask to see applications, documents, and any required waivers to evaluate if the respondent is *prima facie* eligible for adjustment of status.
- Delay not attributable to the respondent augurs in favor of granting continuance. (Which party is most responsible for the delay?)
- IJs must "articulate, balance, and explain" all relevant factors in determining whether to deny continuance request -- failure to provide a reason is an abuse of discretion. *Matter of Hashmi*, 24 I&N Dec. 785, 794 (BIA 2009).
- *Hashmi* analysis was extended to **pending I-140** (employment based) context in *Matter of Rajah*, 25 I&N Dec. 127 (BIA 2009). However, the mere pending of a labor certification is generally not sufficient to grant continuance.
- In determining whether to continue for adjudication of pending **"U" nonimmigrant visa**, an IJ should consider (1) DHS's response to alien's motion to continue; (2) whether the underlying visa is *prima facie* approvable; and (3) the reason for the continuance and other procedural factors. *Matter of Sanchez-Sosa*, 25 I&N Dec. 807 (BIA 2012). To show *prima facie* eligibility for a U visa, an alien must have suffered substantial physical or mental abuse as the innocent victim of a qualifying crime for which the alien has been, is being, or will be helpful to law enforcement, which ordinarily requires an approved law enforcement certification. An alien who has filed a *prima facie* approvable petition for a U visa with USCIS will usually warrant a favorable exercise of discretion for a continuance. Good cause to continue will ordinarily not be shown if a law enforcement certification has not been approved, absent DHS support or other compelling circumstances. *Id.* If an alien is inadmissible, such as due to crimes, an IJ should assess the likelihood that USCIS will exercise its discretion favorably. *Id.*

## MOTIONS TO ADVANCE

Motions to advance are generally disfavored, but may be appropriately filed when there is imminent *ineligibility* for relief or there is a health crisis necessitating immediate IJ action. *See Immigration Court Practice Manual*, Chapter 5.10(b). Such motions are also commonly filed when an alien wishes to withdraw all applications for relief and seeks to depart voluntarily within a specific time frame.

## MOTIONS TO CHANGE VENUE

***See* New Operating Policies and Procedures Memorandum (OPPM) 18-01: Change of Venue. This OPPM replaces OPPM 01-02. Effective January 17, 2018.**

- "The Immigration Judge, for good cause, may change venue only upon motion by one of the parties, and after the charging document has been filed with the Immigration Court." 8 C.F.R. § 1003.20(b).
- A motion may be granted only after the other party has been given notice and an opportunity to respond.
- "No change of venue shall be granted without identification of a fixed street address, including city, state and ZIP code …." 8 C.F.R. § 1003.20(c).
- The motion should be made in writing and supported by evidence, and should contain the following information: (1) date and time of next hearing; (2) an admission or denial of the factual allegations and charge(s) contained in the Notice to Appear; (3) a designation or refusal to designate a country of removal; (4) a description of the basis for eligibility; (5) the address and telephone number of the location at which the respondent will be residing if the motion is granted; (6) if the address at which the alien is receiving mail has changed, a properly completed Alien's Change of Address Form, Form EOIR-33/IC); and (7) a detailed explanation of the reasons for the request. *See Immigration Court Practice Manual*, at Chapter 5.10(c).
- It is not unreasonable for an IJ to deny a motion to change venue when issues of removability have not yet been resolved. *See generally Matter of Chow*, 20 I&N 647 (BIA 1993); *Matter of Rivera*, 19 I&N Dec 688 (BIA 1988).
- The decision to grant is discretionary. Various factors to consider include: administrative convenience; expeditious treatment of case; location of witnesses; cost of transporting witnesses or evidence to a new location; alien's place of residence. *Matter of Rahman*, 20 I&N Dec. 480 (BIA 1992).
- The mere fact an alien wishes to reside in another city does not generally outweigh DHS opposition, particularly if DHS can establish prejudice. *Matter of Rahman*, 20 I&N Dec. 480, 484 (BIA 1992).
- Prejudice to DHS with respect to cost of transporting witnesses to hearing is a relevant factor to consider. *Matter of Rivera*, 19 I&N Dec 688, 690 (BIA 1988).
- Accommodation of alien's choice of distant counsel is not required, especially when it has not been established that local counsel is unavailable. *Matter of Rahman*, 20 I&N Dec. 480, 484 (BIA 1992).
- The mere filing of a motion to change venue does not relieve the respondent of his obligation to appear. *Matter of Patel*, 19 I&N Dec. 260, 262 (BIA 1985), *aff'd*, *Patel v. INS*, 803 F.2d 804 (5th Cir. 1986).

## MOTIONS TO CONSOLIDATE or SEVER

- The Board, citing to a prior version of the regulations (8 C.F.R. § 242.8(a)), noted that IJs may take any action consistent with applicable laws and regulations as may be appropriate to the disposition of a case, and, thus, subject to due process requirements, an IJ had the implicit authority to consolidate the cases of different respondents to promote administrative efficiency. *Matter of Taerghodsi*, 16 I&N Dec. 260 (BIA 1977) (note that similar regulation is now found at 8 C.F.R. § 1003.10(b)). However, the alien must be able to fully litigate his or her claim, and the IJ must be mindful to consider evidence only as it relates to a particular alien. *Matter of Taerghodsi*, 16 I&N Dec. 260, 263 (BIA 1977).
- However, consolidation is generally limited to cases involving immediate family members. The Practice Manual presumes consolidation only upon filing of motion by a party. *Immigration Court Practice Manual*, at Chapter 4.21(a). An IJ may similarly sever cases in the exercise of discretion upon the filing of a motion by a party. *Immigration Court Practice Manual*, at Chapter 4.21(b).

## MOTIONS FOR SUBSTITUTION OF COUNSEL

- Motions may be made orally or in writing, accompanied by Notice of Entry of Appearance of Attorney or Representative, Form EOIR-28.
- Written motions should include: (1) the reasons for the substitution of counsel; (2) evidence that prior counsel has been notified about the motion; and (3) evidence of the alien's consent to the substitution of counsel.
- IJs should consider reasons for the motion, and length of time prior to next scheduled hearing (continuances based on substitution of counsel are not favored). *See Immigration Court Practice Manual* Chapter 2.3(i)(i).
- There is no need for prior counsel to file motion to withdraw if motion to substitute is granted, however, until such motion is granted the original counsel remains the attorney of record.

## MOTIONS TO WITHDRAW AS COUNSEL

- May be made orally or in writing and must be filed when an attorney wishes to withdraw as counsel when the alien has not obtained new counsel.
- Written motions should include: (1) the reasons for withdrawal; (2) the last known address of the alien; (3) a statement that the attorney has notified the alien of the request to withdraw or, if alien could not be notified, an explanation of the efforts made to notify the alien; (4) evidence of the alien's consent to withdraw or a statement as to why evidence of consent is not obtainable; and (5) evidence that the attorney notified,

or attempted to notify, the alien of pending deadlines, time and location of next hearing, the necessity of meeting deadlines and appearing at hearings and the consequences of failing to do so. *See Matter of Rosales,* 19 I&N Dec. 655 (BIA 1988); *see also Immigration Court Practice Manual* Chapter 2.3(i)(ii).

- IJs should consider time remaining before next hearing and the reasons given for the motion.
- Until the motion is granted, counsel remains attorney of record and must attend hearings.

## MOTIONS TO ADMINISTRATIVELY CLOSE

- There is no statute or regulation providing for administrative closure. *Matter of Castro-Tum*, 27 I&N Dec. 271, 282 (A.G. 2018). The regulations provide for administrative closure only in specific categories of cases. *Id.* at 273, 275-77.
- The Attorney General declined to exercise his general authority and holds that administrative closure is appropriate only for cases in which it is authorized by regulation or a judicially approved settlement. *Castro-Tum*, 27 I&N Dec. 271, 273 (overruling *Matter of Avetisyan*, 25 I&N Dec. 688 (BIA 2012, *Matter of W-Y-U*, 27 I&N Dec. 17 (BIA 2017), and all prior inconsistent Board decisions).
- Prior to *Castro-Tum*, administrative closure historically had been an important, well-established, and longstanding procedure in Immigration Court proceedings.
- Administrative closure of proceedings was merely an administrative convenience which allowed the temporary removal of cases from the docket in certain situations. *See Castro-Tum,* 27 I&N Dec. 271, 273-74 (citing to *Matter of Amico*, 19 I&N Dec. 652 (BIA 1988)).

## MOTIONS FOR SUBPOENAS AND DEPOSITIONS

- If an IJ is satisfied that a witness is not reasonably available at the place of hearing and that the testimony of such witness is essential, the IJ may order the taking of a deposition. The order shall designate the official by whom the deposition shall be taken, may prescribe and limit the content, scope, or manner of taking the deposition, and may direct the production of documentary evidence. 8 C.F.R. § 1003.35(a).
- An IJ has exclusive jurisdiction to issue subpoenas requiring the attendance of witnesses or for the production of evidence, or both. The subpoena may be issued on the IJ's own volition or upon application of a party. 8 C.F.R. § 1003.35(b)(1).
- If a party seeks a subpoena, he or she must state in writing or at the hearing, what is expected to be proven, and the party must show affirmatively that diligent efforts were made, without success, to produce the same. 8 C.F.R. § 1003.35(b)(2).
- Upon being satisfied that the witness will not appear to testify or produce evidence and the testimony or evidence is "essential," the IJ "shall" issue a subpoena. 8 C.F.R. § 1003.35(b)(3).
- The subpoena recipient must be over age 18. 8 C.F.R. § 1003.35(b)(5).

- If a subpoena is ignored, the IJ "shall request" the United States Attorney for the district in which the subpoena was issued to report such neglect or refusal to the United States District Court and to request such court to issue an order requiring the witness to appear and testify and to produce evidence. 8 C.F.R. § 1003.35(b)(6). In practical terms, an IJ would consult with an ACIJ and the Office of the General Counsel.

## MOTIONS TO SUPPRESS

- The test for admissibility of evidence is whether it is probative and its use must be fundamentally fair so as not to deprive an alien of due process of law. *Matter of Toro*, 17 I&N Dec. 340 (BIA 1980).
- Although evidence seized during an illegal arrest may be suppressed in a criminal proceeding, the mere fact of an illegal arrest has no bearing on a subsequent immigration proceeding. *Matter of Mejia*, 16 I&N Dec. 6 (BIA 1976); *see also INS v. Lopez-Mendoza*, 468 U.S. 1032 (1984) (stating that the exclusionary rule does not apply to deportation proceedings, absent egregious Fourth Amendment violations which transgress notions of fundamental fairness).
- Absent any indication DHS's Record of Deportable/Inadmissible Alien (Form I-213) contains information that is incorrect or was obtained by coercion or duress, such document is inherently trustworthy and admissible to prove alienage and removability. *Matter of Barcenas*, 19 I&N Dec. 609 (BIA 1988). One who raises a claim questioning the legality of evidence must come forward with proof establishing a *prima facie* case before DHS will be called upon to justify the manner in which it obtained the evidence. *Id.*

## MOTIONS TO RECONSIDER

- Only one motion to reconsider is allowed. 8 C.F.R. § 1003.23(b)(1).
- The motion must be filed within 30 days of the date of a final administrative order.
- A motion to reconsider asserts that the Board made a factual or legal error at the time it rendered the previous decision. *Matter of Cerna*, 20 I&N Dec. 399 (BIA 1991); *see also Matter of O-S-G-*, 24 I&N Dec. 56 (BIA 2006).
- An IJ may, upon own motion, reconsider any case in which he or she has made a decision unless jurisdiction has vested with the Board.
- There is no time limitation for DHS to file a motion to reconsider in removal proceedings; and no DHS time limitations in deportation or exclusion proceedings when the basis of the motion is fraud in the original proceedings or a crime that would support termination of asylum.
- Any departure, including removal, deportation, or exclusion for the United States shall constitute withdrawal of the motion. *But see Matter of Bulnes*, 24 I&N Dec. 57 (BIA 2009) (holding that an alien's departure from the United States while an under an outstanding order of deportation or removal issued *in absentia* does not deprive the IJ of jurisdiction to rescind the order if premised on lack of notice). Circuit courts have significantly limited the applicability of the departure bar and *Matter of Armendarez*,

24 I&N Dec. 646 (BIA 2008).

- The motion must be in writing and signed by the affected party or attorney of record. 8 C.F.R. § 1003.23(b)(1)(i).
- The motion shall state whether the validity of the removal order is subject to any judicial proceedings and, if so, the nature and date thereof, the court in which such proceedings took place or is pending, and its result or status.
- An EOIR-28, Notice of Entry of Appearance, must be filed unless DHS is the moving party. 8 C.F.R. § 1003.23(b)(1)(ii).
- A motion can be reassigned to another IJ if the original IJ is not available. 8 C.F.R 1003.23(b)(1)(iii).
- IJs may set and extend deadlines. A motion is deemed unopposed unless a timely response is made. 8 C.F.R. § 1003.23(b)(1)(iv).
- A response is due within **10** days after the motion is received by the Immigration Court. *See Immigration Court Practice Manual*, Chapter 3.1(b)(iv) (Updated 10/20/17).
- No automatic stay applies, unless the motion involves *in absentia* order. 8 C.F.R. § 1003.23(b)(v).
- The motion must specify errors of fact or law and "shall" be supported by pertinent authority. 8 C.F.R. § 1003.23(b)(2).
- A party may not seek reconsideration of a prior denial of a motion to reconsider.
- A party may not submit new evidence with the motion. *Matter of Cerna*, 20 I&N Dec. 399, 402-03 (BIA 1991).

## MOTIONS TO REOPEN

- Only one motion to reopen is allowed.
- A motion must be filed within 90 days of the date of a final administrative order.
- A motion to reopen seeks to reopen proceedings so that new evidence can be presented and a new decision entered on a different factual record, normally after a further evidentiary hearing. *Matter of Cerna*, 20 I&N Dec. 399 (BIA 1991).
- An IJ may, upon his or her own motion, reopen any case in which he or she has made a decision unless jurisdiction has vested with the Board. Proceedings should be reopened *sua sponte* only under "exceptional" circumstances. *Matter of J-J-*, 21 I&N Dec. 976, 984 (BIA 1997).
- There is no time limitation for DHS to file a motion to reopen in removal proceedings; and no DHS time limitations in deportation or exclusion proceedings when the basis of the motion is fraud in the original proceedings or a crime that would support termination of asylum.
- Any departure, including removal, deportation, or exclusion for the United States shall constitute withdrawal of the motion. *See generally Matter of Okoh*, 20 I&N Dec. 864 (BIA 1994); *but see Matter of Bulnes*, 24 I&N Dec. 57 (BIA 2009) (holding that an alien's departure from the United States while an under an outstanding order of deportation or removal issued *in absentia* does not deprive the IJ of jurisdiction to rescind the order if premised on *lack of notice*). Circuit courts have significantly limited the applicability of the departure bar and *Matter of Armendarez*, 24 I&N Dec. 646 (BIA

2008).

- A motion must be in writing and signed by the affected party or attorney of record. 8 C.F.R. § 1003.23(b)(1)(i).
- The motion shall state whether the validity of removal order is subject to any judicial proceedings and, if so, the nature and date thereof, the court in which such proceedings took place or is pending, and its result or status.
- An EOIR-28, Notice of Entry of Appearance, must be filed unless DHS is the moving party. 8 C.F.R. § 1003.23(b)(1)(ii).
- A motion can be reassigned to another IJ if the original IJ is not available. 8 C.F.R § 1003.23(b)(1)(iii).
- IJs may set and extend deadlines. A motion is deemed unopposed unless a timely response is made. 8 C.F.R. § 1003.23(b)(1)(iv).
- A response is due within **10** days after the motion is received by the Immigration Court. *See Immigration Court Practice Manual*, Chapter 3.1(b)(iv) (Updated 10/20/17).
- No automatic stay applies, unless motion involves *in absentia* order. 8 C.F.R. § 1003.23(b)(v).
  - The motion "shall" state new facts to be proven at the hearing if the motion is granted and "shall" be supported by affidavits and other evidentiary material. 8 C.F.R. § 1003.23(b)(3).
- If seeking new relief, the alien must submit applications.
- If granting, an IJ must find the evidence to be material and not previously available and could not have been discoverable or presented at prior hearing.
- IJs cannot grant motion to reopen to apply for discretionary relief if it appears that the alien's right to apply for relief was fully explained by the IJ and an opportunity was given to the alien to apply, unless the relief sought involved circumstances occurring after the hearing.
- IJs may deny a motion in the exercise of discretion even if the alien has established *prima facie* eligibility for new relief.
- A motion to reopen to apply for adjustment of status based on a marriage entered into after the institution of removal proceedings may no longer be denied simply because of the fact of DHS opposition to the motion. *See Matter of Lamus*, 25 I&N Dec. 61 (BIA 2009), *modifying Matter of Velarde*, 23 I&N Dec. 253 (BIA 2002).

## Motions to Reopen in the Context of Seeking to Rescind In Absentia Order of Removal, Deportation, or Exclusion

**Removal proceedings**: An alien in removal proceedings must file a motion to rescind an order of removal entered *in absentia* within 180 days of the date of the order if he or she seeks to demonstrate exceptional circumstances for failure to appear. A motion may be filed at any time, if the basis is lack of proper notice. This applies to cases in which service of the Notice to Appear occurs after April 1, 1997. Section 240(b)(5) of the Act; 8 C.F.R. § 1003.23(b)(4)(ii).

- The term "exceptional circumstances" refers to something exceptional and beyond the control of the alien causing a failure to appear, such as battery or extreme cruelty,

serious illness of the alien, or serious illness or death of a spouse, parent, or child of the alien, but nothing less compelling. Section 240(e)(1) of the Act.

- An alien ordered removed *in absentia* must file a motion to reopen with the IJ; the alien cannot file a direct appeal of the order to the Board (though a party may file an appeal from the IJ's decision on the motion to reopen). *Matter of Guzman*, 22 I&N Dec. 722 (BIA 1999).
- The filing of a motion based either on notice or exceptional circumstances serves as an automatic stay of removal until the IJ issues a decision. Section 240(b)(5) of the Act; 8 C.F.R. § 1003.24(b)(4)(ii).
- With respect to notice of the hearing, there is a presumption of delivery, though an alien may overcome such presumption by, among other things, demonstrating whether due diligence was used to remedy the situation, there was an incentive to appear, prior appearances, or affidavits regarding delivery of notice. *See Matter of C-R-C-*, 24 I&N Dec. 677 (BIA 2008); *Matter of M-R-A-*, 24 I&N Dec. 665 (BIA 2008).
- Notice to counsel constitutes notice to the respondent. *Matter of Barocio*, 19 I&N Dec. 255 (BIA 1985); section 240(b)(5)(A) of the Act; 8 C.F.R. § 1292.5(a).
- Traffic delays and car problems generally do not constitute "exceptional circumstances" for failure to appear. *Sharma v. INS*, 89 F.3d 545 (9th Cir. 1996); *Matter of S-A-*, 21 I&N Dec. 1050 (BIA 1997).

**Deportation proceedings – Section 242B**: Applies to deportation proceedings when an Order to Show Cause (Form I-221) is served after June 13, 1992 (but before April 1, 1997). Alien may file a motion to rescind an *in absentia* order of deportation within 180 days of the IJ's order if exceptional circumstances are demonstrated, or at any time if proper notice was not received.

**Pre-June 13, 1992 deportation proceedings and all exclusion proceedings**: A motion to reopen may be granted if the alien demonstrates "reasonable cause" for failing to appear. *See Matter of Nafi*, 19 I&N Dec. 430 (BIA 1987). Time and number limitations do not apply.

**When Ordinary Time and Number Limitations Do Not Apply**

- Generally, only one motion to reopen an *in absentia* order of removal is permitted (though granting a motion essentially erases the prior history, *i.e.*, an alien may generally file one motion to reopen for each failure to appear). *See generally Matter of M-S-*, 22 I&N Dec. 349, 352 (BIA 1998).
- Time and number limitations on motions do not apply if an application for asylum, withholding, or protection under the United Nations Convention Against Torture is based on changed country conditions in the country of return or to where the alien was ordered removed, if the evidence is material and not previously discoverable. (If prior asylum application was deemed to be frivolous, no motion to reopen or stay can be granted). 8 C.F.R. § 1003.23(b)(4)(i). In addition, alien need not first "rescind" an *in absentia* removal order to reopen to apply for asylum based on changed country conditions. *Matter of J-G-*, 26 I&N Dec. 161 (BIA 2013).

- **In removal proceedings**, an *in absentia* order of removal may be rescinded only upon the filing of a motion to reopen within 180 days if the alien's failure to appear was caused by "exceptional circumstances" under section 240(e)(1) of the Act. 8 C.F.R. § 1003.23(b)(ii). However, there is no time limit for filing a motion to rescind an *in absentia* order of removal if the failure to appear was caused by lack of notice or if the alien was in federal or state custody and the failure to appear was through no fault of the alien. *See Matter of Evra*, 25 I&N Dec. 79 (BIA 2009) (holding that an alien's conduct underlying his arrest and incarceration does not constitute "fault" in failing to appear).
- **In deportation proceedings**, alien must file motion to reopen *in absentia* order within 180 days, 8 C.F.R. § 1003.23(b)(4)(iii)(A)(1), or at any time if based on lack of notice or if alien was in federal or state custody at the time of the hearing. 8 C.F.R. § 1003.23(b)(4)(iii)(A)(2). The filing of such motion provides the alien with an automatic stay of deportation. 8 C.F.R. § 1003.23(b)(4)(iii)(C). Time and number limitations do no apply. 8 C.F.R. § 1003.23(b)(4)(iii)(2)(D).
- **In exclusion and in "old" section 242(b) deportation (OSC issued prior to June 13, 1992) proceedings**, an alien need only show "reasonable cause" for failing to appear. 8 C.F.R. § 1003.23(b)(4)(iii)(B); *see Matter of Cruz-Garcia*, 22 I&N Dec. 1155 (BIA 1999).
- There are no time or number limitations for motions to reopen "agreed upon by all parties and jointly filed." 8 C.F.R. § 1003.23(b)(4)(iv).
- When claiming ineffective assistance of counsel caused an alien to file a motion untimely, whether the alien demonstrated due diligence such that "equitable tolling" is appropriate is decided on a case-by-case basis.

Exceptions To The Time And Number Limitations

## MOTIONS TO RECUSE

***See* Operating Policies and Procedures Memorandum (OPPM) 05-02: Procedures For Issuing Recusal Orders In Immigration Proceedings. Effective March 21, 2005.**

## MISCELLANEOUS MOTIONS

- Motion For Extension.
- Motion To Accept An Untimely Filing.
- Motion For Closed Hearing.
- Motion To Waive Representative's Appearance.
- Motion To Waive Respondent's Appearance.
- Motion To Permit Telephonic Appearance.
- Motion to Request an Interpreter
- Motion For Video Testimony.
- Motion To Present Telephonic Testimony.

- Motion To Amend.
- Motion To Stay Removal Or Deportation.
- Motion to Reissue
- Motion to Recalendar

**This outline is intended as a reference tool only, containing general rules. Any user is strongly encouraged to rely additionally on his or her independent research, including circuit court specific variations to Board law.**

**U.S. Department of Justice**

Executive Office for Immigration Review

*Office of the Chief Immigration Judge*

Chief Immigration Judge

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July 31, 2017

**MEMORANDUM**

TO: All Immigration Judges
All Court Administrators
All Attorney Advisors and Judicial Law Clerks
All Immigration Court Staff

FROM: MaryBeth Keller
Chief Immigration Judge

SUBJECT: Operating Policies and Procedures Memorandum 17-01: *Continuances*

This Operating Policies and Procedures Memorandum (OPPM) supplements and amends OPPM 13-01. It is intended to provide guidance to assist Immigration Judges with fair and efficient docket management relating to the use of continuances. It is not intended to limit the discretion of an Immigration Judge, and nothing herein should be construed as mandating a particular outcome in any specific case. Rather, its purpose is to provide guidance on the fair and efficient handling of motions for continuance in order to ensure that adjudicatory inefficiencies do not exacerbate the current backlog of pending cases nor contribute to the denial of justice for respondents and the public.

This OPPM also reminds Immigration Judges that in all situations in which a continuance is granted at a hearing, they must make the reason(s) for the adjournment clear on the record, by stating the reasons orally or by setting forth in writing the reason(s) in an order. In all cases, the judge should also annotate the case worksheet on the left side of the Record of Proceedings with the corresponding adjournment code. The Court Administrators and court staff must ensure that each adjournment code is accurately entered into CASE.

The number of pending cases before immigration courts currently exceeds 600,000. Although multiple factors may have contributed to this case load, Immigration Judges must ensure that lower productivity and adjudicatory inefficiency do not further exacerbate this situation. To that end, it is more important than ever that Immigration Judges ensure that our resources are used efficiently.

In particular, the delays caused by granting multiple and lengthy continuances, when multiplied across the entire immigration court system, exacerbate already crowded immigration dockets. In 2012, the Office of the Inspector General of the U.S. Department of Justice found that "frequent and lengthy continuances" were a significant contributing factor to increased case processing times and that over half of all cases surveyed had one or more continuances, with an average in those cases of four continuances and 368 days of continuance, per case. U.S. Department of Justice, Office of Inspector General, *Management of Immigration Cases and Appeals by the Executive Office for Immigration Review* (Oct. 2012), https://oig.justice.gov/reports/2012/e1301.pdf. A recent report by the U.S. Government Accountability Office showed that the use of continuances in immigration proceedings increased 23% between fiscal years 2006 and 2015. U.S. Government Accountability Office, *Immigration Courts, Actions Needed to Reduce Case Backlog and Address Long-Standing Management and Operational Challenges* (June 2017), https://www.gao.gov/assets/690/685022.pdf. Furthermore, despite an increase in the hiring of Immigration Judges, initial case completion numbers in Fiscal Year 2016 were essentially the same as in Fiscal Year 2012, and recent overall case completion numbers have declined notably compared to the numbers from Fiscal Years 2004 to 2011. U.S. Department of Justice, Executive Office for Immigration Review, Statistics Yearbooks FY 2004-FY 2016, https://www.justice.gov/eoir/statistical-year-book.

In addition to complicating the resolution of individual cases by prolonging the time between hearings, multiple continuances can strain overall court resources, including administrative and interpreter resources, and consume docket time that could otherwise be used to resolve additional cases. Therefore, it is critically important that Immigration Judges use continuances appropriately and only where warranted for good cause or by authority established by case law.

The Immigration and Nationality Act (INA) generally does not establish any specific "right" to a continuance in immigration proceedings. Rather, the availability of continuances is primarily governed by 8 C.F.R. § 1003.29, which provides that an "immigration judge may grant a motion for continuance for good cause shown." In certain circumstances, case law further refines the regulatory definition of good cause and informs consideration of specific types of continuance requests, including requests to obtain additional evidence and requests to continue proceedings to await adjudication by U.S. Citizenship and Immigration Services (USCIS) of a relevant petition. In other situations, because the reasons for requesting a continuance vary widely, an assessment of good cause will depend on the specific factors of each case. Nevertheless, in general, the reason and support for the request as well as any opposition to it, the timing of the request, the respondent's detention status, the complexity of the case, the number and length of any prior continuances, and concerns for administrative efficiency are all appropriate factors to be considered in determining whether to grant a continuance and for how long.

Overall, while administrative efficiency cannot be the only factor considered by an Immigration Judge with regard to a motion for continuance, it is sound docket management to carefully consider administrative efficiency, case delays, and the effects of multiple continuances on the efficient administration of justice in the immigration courts. This consideration is even more salient in cases where the respondent is detained. In all cases, an Immigration Judge must carefully consider not just the number of continuances granted, but also the length of such continuances. Most importantly, Immigration Judges should not routinely or automatically grant continuances absent a showing of good cause or a clear case law basis.

Further, although the appropriate use of continuances serves to protect due process, which Immigration Judges must safeguard above all, there is also a strong incentive by respondents in immigration proceedings to abuse continuances, and Immigration Judges must be equally vigilant in rooting out continuance requests that serve only as dilatory tactics. As the Supreme Court has recognized, "[o]ne illegally present in the United States who wishes to remain already has a substantial incentive to prolong litigation in order to delay physical deportation for as long as possible." *INS v. Rios-Pineda*, 471 U.S. 444, 450 (1985). Moreover, "as a general matter, every delay works to the advantage of the deportable alien who wishes merely to remain in the United States." *INS v. Doherty*, 502 U.S. 314, 323 (1992). Continuance requests that seek only to prolong

a removable alien's presence in the United States serve neither the public's interest nor the interests of justice, including the related interests of other aliens with meritorious claims whose cases may be delayed collaterally. Thus, as a general matter, continuance requests solely for dilatory purposes should not be countenanced by Immigration Judges.

With these principles in mind, there are several specific recurring categories of continuance requests, all of which may cause significant docketing and administrative efficiency concerns, which warrant additional guidance:

*A. Continuances to Obtain Counsel*

With regard to granting a continuance to give a respondent the opportunity to obtain legal counsel, it remains general policy that at least one continuance should be granted for that purpose. Such a continuance should be of reasonable length, but it is appropriate for Immigration Judges to consider the overall context of the case in determining that length, particularly when all respondents are initially provided a list of pro bono legal service providers in accordance with 8 C.F.R. § 1240.10(a)(2). For each additional request for a continuance, the Immigration Judge should inquire as to the respondent's diligence in securing representation and other relevant information to determine whether there is good cause for a further continuance and, if so, the length of any such continuance.

*B. Continuances for Attorney Preparation*

Although continuances to allow recently retained counsel to become familiar with a case prior to the scheduling of an individual merits hearing are common, subsequent requests for preparation time should be reviewed carefully, especially given that the time between a master calendar hearing and an individual merits hearing, which often exceeds one year in a non-detained case, already encompasses substantial time for preparation. It is also appropriate for Immigration Judges to consider the overall complexity of the case in determining the appropriateness and length of any continuance for attorney preparation time, as well as the number and length of prior continuances for preparation time. In addition, frequent or multiple requests for additional preparation time based on a practitioner's workload concerns related to large numbers of other pending cases should be rare and warrant careful review. "A practitioner's workload must be

controlled and managed so that each matter can be handled competently." 8 C.F.R. § 1003.102(q)(1). Thus, for a practitioner who takes on more cases than he or she can responsibly and professionally handle, necessitating the need for multiple continuances across multiple cases, it may also be appropriate for an Immigration Judge to consider referral to EOIR disciplinary counsel for further action and possible sanction for a violation of 8 C.F.R. § 1003.102.

*C. Continuances of Merits Hearings*

Of particular importance are requests to continue an individual merits hearing that has already been scheduled. Such hearings are typically scheduled far in advance, which provides ample opportunity for preparation time, and often involve interpreters or third-party witnesses whose schedules have been carefully accommodated. Moreover, slots for individual merits hearings cannot be easily filled by other cases, especially if the decision to continue the hearing is made close in time to the scheduled date. Although some continuances of individual merits hearings are unavoidable, especially in situations involving an unexpected illness or death, the continuance of an individual merits hearing necessarily has a significant adverse ripple effect on the ability to schedule other hearings across an Immigration Judge's docket. Thus, such a request should be reviewed very carefully, especially if it is made close in time to the hearing. For a continuance request made well in advance of the scheduled date of the hearing, an Immigration Judge should adjudicate that request expeditiously and, if granted, should endeavor to fill that hearing slot with another individual merits hearing after providing sufficient notice. Further, because an individual merits hearing is typically scheduled far in advance and generally only after considering the availability of a respondent's representative, a request for a continuance based on a scheduling conflict with a respondent's representative that arose after the individual merits hearing has been calendared should be rare and should be considered very carefully. In sum, Immigration Judges generally should not continue individual merits hearings absent a genuine showing of good cause or a clear case law basis.

*D. Continuances Requested By DHS*

Continuance requests made by a trial attorney of the U.S. Department of Homeland Security (DHS) should also be comparatively rare. For continuance requests made by DHS to allow time to complete background investigations and security checks or to allow time to obtain a

respondent's file, it is appropriate for the Immigration Judge to inquire on the record about the ongoing process for obtaining background and security checks or for obtaining the alien's file.

As OPPM 13-01 notes, the legal maxim that "justice delayed is justice denied" is a common refrain in the context of immigration proceedings. Although fundamental fairness and due process require that legal proceedings be postponed in appropriate circumstances, Immigration Judges must also be mindful of the effects of frequent and lengthy continuances, particularly when they are not supported by good cause, on the efficient administration of justice for both respondents and the public.

If you have any questions regarding this OPPM, please contact your Assistant Chief Immigration Judge.

**U.S. Department of Justice**

Executive Office for Immigration Review

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January 17, 2018

**MEMORANDUM**

TO: All Immigration Judges
All Court Administrators
All Attorney Advisors and Judicial Law Clerks
All Immigration Court Staff

FROM: MaryBeth Keller
Chief Immigration Judge

SUBJECT: Operating Policies and Procedures Memorandum 18-01: *Change of Venue*

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## I. Introduction

Changes of Venue (COV) create problems in caseload management and operational inefficiencies in our courts. This Operating Policies and Procedures Memorandum (OPPM) sets forth guidance to mitigate these challenges. These policies and procedures, however, require that every Immigration Judge, in fairness to the receiving Immigration Court, ensures that "good cause has been shown" before granting a motion for COV. This OPPM replaces OPPM 01-02.

## II. Immigration Judge Authority to Change Venue

Venue for Immigration Court proceedings lies with the Immigration Court where the charging document is filed by the Department of Homeland Security (DHS). 8 C.F.R. §§ 1003.14(a) & 1003.20(a). Immigration Judges may, upon a proper motion, change venue in those proceedings pursuant to the authority contained in 8 C.F.R. § 1003.20. The standard for granting a motion for COV is "good cause." 8 C.F.R. § 1003.20(b). The regulation provides authority to grant a change of venue only when one of the parties has filed a motion for COV and the other party has been given notice and an opportunity to respond. *See* 8 C.F.R. § 1003.20(b). Immigration Judges may not *sua sponte* change venue.

In limited circumstances, a case can be moved between detained and non-detained courts without the necessity of a motion for COV. Such "clerical transfers" are only authorized when allowed under the administrative control list for paired courts. In all other cases, a motion for COV is required before a case can be moved from one Immigration Court to another. Because changes of venue necessarily delay case adjudications and create caseload management difficulties, more than two motions to change venue by the same party are disfavored. Further, motions to change venue solely for dilatory purposes should not be condoned by Immigration Judges. Motions to change venue after a merits hearing has begun are strongly disfavored.

## III. Requirement to Follow the Law of the Case Doctrine in Change of Venue Cases

Once an Immigration Judge issues an order changing venue to another court, the receiving Judge is not free to hear the case *de novo* and ignore any orders prior to the venue change, unless exceptional circumstances, described in this OPPM, permit departure from this policy. The law of the case doctrine, while non-statutory, is a well-established legal doctrine with a long-standing foundation in the federal courts. In essence, this rule requires that once a court finally decides any issue of law, the ruling should not be altered by the receiving court. Adherence to this doctrine is so critical in COV situations that even the Supreme Court has declared that "the policies supporting the doctrine apply *with even greater force to transfer decisions* than to decisions of substantive law; transferee courts that feel entirely free to revisit transfer decisions of a coordinate court threaten to send litigants into a vicious circle of litigation." *Christianson v. Colt Industries Operating Corp.*, 486 U.S. 800, 816 (1988) (emphasis added).

Following the law of the case doctrine is crucial "to preserve the ordered functioning of the judicial process." *United States v. Baynes*, 400 F. Supp. 285, 310 n.3 (E.D. Penn.), *aff'd*, 517 F.2d 1399 (3d Cir. 1975). It is also used "to prevent 'delay, harassment, inconsistency, and in some instances judge-shopping.'" *General Electric Co. v. Westinghouse Electric Corp.*, 297 F. Supp. 84,

86 (D. Mass. 1969). Moreover, it "promotes the finality and efficiency of the judicial process by 'protecting against the agitation of settled issues.'" *Christianson*, 486 U.S. at 816.

Immigration Judges are not expected to follow this rule blindly, however. The law of the case doctrine is not absolute; rather, there are certain delineated circumstances where departure from the doctrine may be permitted. As one court indicated, the "rule was not absolute and all-embracing and there are exceptional circumstances which will permit one judge of a district court to overrule a decision by another judge of the same court in the same case." *United States v. Wheeler*, 256 F.2d 745,747 (3d Cir.), cert. denied, 383 U.S. 873 (1958). Circumstances which may warrant a deviation from this policy include: 1) a supervening rule of law; 2) compelling or unusual circumstances; 3) new evidence available to the second judge; and 4) such clear error in the previous decision that its result would be manifestly unjust. *Hayman Cash Register Co. v. Sarokin*, 669 F.2d 162, 169 (3d Cir.1982). *See also Christianson*, 486 U.S. at 816; *Arizona v. California*, 460 U.S. 605, 617 (1983).

In maintaining this requirement from OPPM 01-02, this OPPM continues to emphasize that the law of the case doctrine is consistent with all existing immigration laws and regulations, and its application can be inferred from 8 C.F.R. § 1240.1(b). Moreover, one coherent record is necessary to comply with the requirements for review once an appeal is filed. *See* 8 C.F.R. § 1003.5. Lastly, because the law of the case doctrine has been categorized "only as a rule of policy and not as one of law," *Wilson v. Ohio River Co.*, 236 F. Supp. 96, 98 (S.D. W.V.A. 1964), pursuant to the authority under 8 C.F.R. § 1003.9, the law of the case doctrine, as stated in this section, shall apply in COV circumstances.

The law of the case doctrine includes the recognition of another Immigration Judge's COV order. Absent one of the circumstances discussed above, Immigration Judges cannot return a case to the sending court on the ground that the change of venue was improper.

## IV. Specific Requirements for Oral and Written Motions for Change of Venue

### A. Oral Motions

If either party makes an oral motion for COV, the Immigration Judge must record the motion, as well as his or her decision on the motion, on the Digital Audio Recording (DAR) system.

The Immigration Judge must issue a written order (either a long-form order or a standardized order generated by the case management system) on the oral motion for COV. Notations in the ROP or on the Immigration Judge worksheet are insufficient to grant a motion for COV. The court administrator at the receiving court will return to the sending court any ROP that does not contain a written order.

### B. Written Motions

The Immigration Judge must issue a written order (either a long-form order or a standardized order generated by the case management system) on the motion for COV. Notations

in the ROP or on the Immigration Judge worksheet are insufficient to grant a motion for COV. The court administrator at the receiving court will return to the sending court any ROP that does not contain a written order.

## V. Administrative Requirements for Valid Venue Changes

### A. Mandatory Forwarding Address for Non-Detained Cases

A motion for COV should not be granted without identification of a fixed street address, including city, state and ZIP code, where the movant can be reached for further hearing notification. 8 C.F.R. § 1003.20(c). This requirement was instituted to avoid a court receiving an ROP through a motion for COV and having no way to notify the party of a hearing date at the new location. It also allows the sending court to determine the correct receiving court to which the case should be transferred.

### B. Pleadings, Issue Resolution, and Scheduling

Prior to granting a motion for COV, the assigned Immigration Judge should make every effort, consistent with procedural due process requirements, to complete as much of the case as possible in the time available. Specifically, the Immigration Judge should attempt to obtain pleadings; resolve the issue of deportability, removability, or inadmissibility; determine what form(s) of relief will be sought; set a date certain by which the relief application(s), if any, must be filed with the court; and state on the record that failure to comply with the filing deadline will constitute abandonment of the relief application(s) and may result in the Judge rendering a decision on the record as constituted. In cases where the Immigration Judge has completed these actions but not yet scheduled the case for an individual merits hearing, the Immigration Judge should also determine, when granting a change of venue, whether the case should be scheduled for a master calendar hearing or an individual merits hearing at the new court. If the latter, the Immigration Judge should indicate on the worksheet that a case involving a change of venue should be scheduled for an individual merits hearing, and Immigration Court staff will identify the record of proceeding for the receiving court to schedule upon receipt. In situations where a non-detained case is already scheduled for an individual merits hearing and a change of venue is subsequently granted, the case should be scheduled for an individual merits hearing at the new venue without an intervening master calendar hearing, and Immigration Court staff will identify the record of proceeding for the receiving court to schedule accordingly.

When it is anticipated based on the guidance above that the case will proceed immediately to an individual merits hearing at the new venue, the Immigration Judge granting the change of venue must advise the respondent that any arrangements to retain existing counsel or obtain new counsel should be made sufficiently in advance of the hearing in the new venue to enable that hearing to proceed on the date scheduled. When deciding on motions to continue in the receiving court, the Immigration Judge is encouraged to consider, among all the relevant facts and circumstances, the respondent's efforts to resolve any representation issues before the subsequent hearing and the amount of time the respondent has had to do so.

For cases to be scheduled on a master calendar after a change of venue has been granted, the master calendar hearing at the new court should occur as soon as practicable and no later than 14 days (for a detained case) or 60 days (for a non-detained case) after the date the change of venue was granted.

Note, however, that in the case of a defensive asylum application, a copy of the asylum application, Form I-589, submitted to support a motion for COV is not considered filed. In this situation, if the motion for COV is granted, the Form I-589 must be separately filed with the court, either at the window or by mail. *See* OPPM 16-01, *Filing Applications for Asylum.*

C. Venue in Detained Cases

For various reasons, DHS sometimes relocates detained aliens after charging documents have been filed. The Immigration Court does not automatically change venue, however, when DHS moves an alien to a location outside the administrative control of the court where the case is pending. Further, the DHS filing a Form I-830, by itself, does not constitute a motion for COV. If DHS fails to produce a detainee because that alien has been moved to another location, the Immigration Court retains venue and administrative control over the case. If DHS produces the alien at a court in another location, absent a valid order changing venue or a new charging document, venue and administrative control does not reside at that location, except for bond redetermination requests, if any. Nothing in this paragraph precludes an alien from filing a motion to change venue if he or she is moved to a detention location outside the administrative control of the court where the case is otherwise pending.

D. Venue in Cases Involving Asylum Applications

Judges should be mindful that COV orders or clerical transfers in cases involving asylum applications may have asylum-clock implications. *See* OPPM 13-02, *The Asylum Clock.* Judges should also be mindful of the one-year asylum filing deadline.

Nothing in this OPPM is intended to limit the discretion of an Immigration Judge, and nothing herein should be construed as mandating a particular outcome in any specific case. If you have any questions regarding this OPPM, please contact your Assistant Chief Immigration Judge.

**U.S. Department of Justice**

Executive Office for Immigration Review

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March 21, 2005

MEMORANDUM

TO: All Immigration Judges
All Court Administrators
All Judicial Law Clerks
All Immigration Court Staff

FROM: The Office of the Chief Immigration Judge

SUBJECT: Operating Policies and Procedures Memorandum 05-02:
Procedures For Issuing Recusal Orders In Immigration Proceedings

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## I. INTRODUCTION

This Operating Policies and Procedures Memorandum ("OPPM") sets forth procedures for immigration judges to follow when issuing recusal orders. It replaces my memorandum entitled "Recusal in Immigration Court Proceedings," dated July 18, 1997.

## II. BACKGROUND ON RECUSAL

Recusal is the process under which a judge is excused or disqualifies himself or herself from presiding over a case in which he or she may have an interest or may be unduly prejudiced. This obligation to recuse is not limited to those instances where a party makes a motion; rather,

it also places a burden on a judge to sua sponte identify those circumstances where recusal may be appropriate. Liteky v. U.S., 510 U.S. 540, 548 (1994). Title 28 United States Code § 455[1] codified this doctrine and states in pertinent part:

> § 455. Disqualifications of justice, judge or magistrate.
> (a) Any justice, judge or magistrate judge of the United States[2] shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.
> (b) He shall also disqualify himself in the following circumstances:
> (1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding; . . . [3]

In the immigration context,[4] the regulations provide for withdrawal and substitution of

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[1] This section of title 28 is not the only section relating to recusals; 28 U.S.C. § 144 also addresses the issue of judicial bias. Section 144, however, is an older section of the code which requires a judge to examine the issue of recusal upon a party's filing of an affidavit. Section 455 is not only broader in scope but is the more commonly used section. Moreover, it does not require a motion by a party to be invoked.

[2] Although this section does not specifically mention immigration judges, this section and its applicable case law offers strong guidance on the recusal issue. Moreover, it mirrors the judicial canons of the American Bar Association's Code of Judicial Conduct (see footnote 3), which do apply to immigration judges. Immigration judges are not required to comply with the American Bar Association's Code, but the Code reflects principles to which immigration judges should "aspire." See Ethics Manual For Members of the Board of Immigration Appeals, Immigration Judges, and Administrative Law Judges Employed by the Executive Office for Immigration Review, p. 4.

[3] This section parallels Canon 3(E)(1) of the American Bar Association's Code of Judicial Conduct which states:

> E. Disqualification.
> (1) A judge shall disqualify himself or herself in a proceedings in which the judge's impartiality might reasonably be questioned, including but not limited to instances where:
> (a) the judge has a personal bias or prejudice concerning a party or a party's lawyer, or personal knowledge of a disputed evidentiary facts concerning the proceeding; . . .

[4] Prior to the enactment of IIRIRA, section 242(b) of the INA mandated recusals in certain situations. This provision was eliminated by IIRIRA. Recusals are now only regulatory. Section 242(b) of the INA prior to its amendment read as follows:

> No special inquiry officer shall conduct a proceeding in any case under this section in which

immigration judges, and state, in part:

> The immigration judge assigned to conduct the hearing shall at any time withdraw if he or she deems himself or herself disqualified. 8 C.F.R. § 1240.1(b).

The Board of Immigration Appeals (BIA) has addressed the issue of recusal in Matter of Exame, 18 I&N Dec. 303 (BIA 1982). In Exame, the BIA recognized three instances that warrant recusal: (1) when the alien demonstrates that he was denied a constitutionally fair proceeding; (2) when the immigration judge has a personal bias stemming from an "extrajudicial" source; and (3) when the immigration judge's judicial conduct demonstrates "such pervasive bias and prejudice." Id. at 305 (quoting Davis v. Board of Sch. Comm'rs of Mobile County, 517 F.2d 1044 (5th Cir. 1975).

## III. WHEN IS RECUSAL WARRANTED?

Recusal is not a tool which parties and judges can arbitrarily invoke to rid themselves of unpleasant or difficult cases. Rather, recusal is mandated only in certain clearly delineated instances. Indeed, **judges have *an obligation not to recuse themselves*** in certain circumstances. *See* Laird v. Tatum, 409 U.S. 824, 837 (1972) (holding "a federal judge has a duty to sit where not disqualified which is equally as strong as the duty to not sit where disqualified") (and cases cited therein); Nichols v. Alley, 71 F.3d 347, 351 (10th Cir. 1995) ("Further, we are mindful that a judge has as strong a duty to sit when there is no legitimate reason to recuse as he does to recuse when the law and facts require.") (and cases cited therein); United States v. Greenough, 782 F.2d 1556, 1558 (11th Cir. 1986) ("A second policy is that a judge, having been assigned to a case, should not recuse himself on unsupported, irrational, or highly tenuous speculation."); Martin-Trigona v. Lavien, 573 F. Supp. 1237, 1243 (D. Conn. 1983) ("There is an obligation on the part of a judge to decline to recuse himself for a 'relatively trivial reason.'"); Sexson v. Servaas, 830 F. Supp. 475, 482 (S.D. Ind. 1993) (finding "a judge's duty not to recuse when confronted with a motion that has little basis in reality, both factual and legal, is as strong as the duty to recuse"); *but see* United States v. Kelly, 888 F.2d 732, 744 (11th Cir. 1989) (holding that § 455 eliminated the doctrine of "duty to sit").[5] This obligation is to prevent parties from using

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> he shall have participated in investigative functions or in which he shall have participated (except as provided in this subsection) in prosecuting functions.

[5] When Congress amended § 455 in 1974 to create an objective standard for recusal, its intent was to "promote public confidence in the impartiality of the judicial process . . . ." H. R. Rep. No. 93-1453, 1974 at 6355. Congress, by clarifying § 455, attempted to remove the old "duty to sit" doctrine, a subjective test which required "a judge, faced with a close question on disqualification, was urged to resolve the issue in favor of a 'duty to sit.'" Id. Congress cautioned, however that "the new test [objective test] should not be used by judges to avoid sitting on difficult or controversial cases . . . Disqualification for lack of impartiality must have a reasonable basis. Nothing in this proposed legislation should be read to warrant the

recusal as an excuse to judge or forum shop, as well as to preserve the integrity of the judicial process. *See* Martin-Trigona, 573 F. Supp. at 1242 (claiming "the right to an impartial judge cannot be advanced so broadly as to permit the parties to engage in 'judge-shopping' under the guise of a motion to recuse . . . or to permit a litigant to disqualify without reasonable grounds a succession of judges for the apparent purpose of impeding the administration of justice") (*citing* United States v. Boffa, 513 F. Supp. 505, 508 (D. Del. 1981)); In re Parr, 13 B.R. 1010 (E.D.N.Y. 1981)); *see also* Greenough, *supra* at 1558 ("If this [unsubstantiated recusal] occurred, the price of maintaining the purity of the appearance of justice would be the power of litigants or third parties to exercise a veto over the assignment of judges."); *see also* Laird, *supra*; United States v. Kanahele, 951 F. Supp. 921, 925 (D. Haw. 1995), *dismissed in part, aff'd in part*, 103 F.3d 142 (1996).

**The test for determining whether recusal is an appropriate remedy is an objective one**. Under this standard, a judge should recuse him or herself when it would appear to a reasonable person, knowing all the relevant facts, that a judge's impartiality might reasonably be questioned. *See* Liteky v. U.S., *supra*; Liljeberg v. Health Servs. Acquisition Corp., 486 U.S. 847 (1988); US v. Winston, 613 F.2d 221 (9th Cir. 1980); Davis, 517 F.2d at 1052. Moreover, the Supreme Court has found that prejudice or bias stemming from an "extrajudicial source," although not required for recusal, is significant and often determinative in establishing grounds for recusal. Liteky v. U.S., *supra*. As one court concisely put it, "the negative bias or prejudice from which the law of recusal protects a party must be grounded in some personal animus or malice that the judge harbors against him, of a kind that a fair-minded person could not entirely set aside when judging certain persons or causes." U.S. v. Balistrieri, 779 F.2d 1191, 1201 (7th Cir. 1985), *cert. denied*, 477 U.S. 908 (1986).

## A. RELEVANT CASE LAW

Case law offers a wealth of guidance for determining when recusal is or is not warranted. The Seventh Circuit concluded that a motion to recuse was properly denied where the respondent claimed that the same immigration judge could not hear both the bond hearing and removal hearing. Flores-Leon v. INS, 272 F.3d 433, 440 (7th Cir. 2001). **Further, a judge should not recuse himself merely because a party sues or threatens to sue him**. Ronwin v. Arizona, 686 F.2d 692 (9th Cir. 1981), *rev'd on other grounds*, 466 U.S. 588 (1984); United States v. Grismore, 564 F.2d 929 (10th Cir. 1977); Kanahele, 951 F. Supp. at 925; United States v. Blohm, 579 F. Supp. 495 (S.D.N.Y. 1984); Martin-Trigona v. Lavien, 573 F. Supp. 1237 (1983). In addition, the **remoteness in time and circumstances of any events which could potentially bias a judge should also be considered.** *See* Balistrieri, *supra*, at 1200 (finding that events

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transformation of a litigant's fear that a judge may decide a question against him into a 'reasonable fear' that the judge will not be impartial. Litigants ought not have to face a judge where there is a reasonable question of impartiality, but they are not entitled to judges of their own choice." Id. Accordingly, **judges continue to have a duty not to disqualify themselves without a reasonable basis.**

taking place ten to twelve years earlier were too remote to meet the reasonable person standard); Kanahele, *supra* at 925 (rejecting a recusal request because of "remoteness and implausibility"). **Nor will a judge's cutting or hostile comments to an attorney regarding his or her skill mandate recusal**. Pau v. Yosemite Park and Curry Co., 928 F.2d 880, 885 (9th Cir 1991); U.S. v. Tucker, 78 F.3d 1313 (8th Cir. 1996), *cert. denied*, 117 S.Ct. 76 (1996); *see also* Davis, *supra* at 1050 (rejecting a plaintiff's claim that the judge's bias against their attorney was imputed on to them). Other circumstances which courts have rejected as insufficient basis for recusal include: adverse rulings against a party; Martin-Trigona, 575 F. Supp. at 1242; a party's attorney is a former law clerk of the judge; Smith v. Pepsico, 434 F. Supp 524 (S.D. Fla. 1977); when a judge has pretrial knowledge of facts from earlier participation in the case; Winston, *supra*; when a judge has formulated an understanding or an opinion on a legal issue through his or her previous exposure to it; *See* Laird, *supra;* or when the media has made characterizations about the case or the judge. *See* Greenough, *supra*. For an excellent summary of factors that would not warrant recusal, *see* United States v. Cooley, 1 F.3d 985 (10th Cir. 1993), *cert. denied*, 515 U.S. 1104 (1995).

## B. OTHER CIRCUMSTANCES WHERE RECUSAL IS PERMITTED

Recusal is permitted where threats, accompanied by action, are so extreme and rise to such a level as to possibly endanger the judge's life. *See* Kanahele, *supra* at 925 (noting that murder threats and steps taken to murder a judge were sufficient to recuse a judge). Recusal is also permissible when the judge has a financial or fiduciary connection with one of the parties. Liljeberg, *supra*. It is also necessary when the parties have a familial relationship, but only to certain degrees. 28 U.S.C. § 455(b)(5). Indeed, the statute clearly outlines circumstances where disqualification is mandated. 28 U.S.C. § 455(b) specifically provides:

> (b) He shall also disqualify himself in the following circumstances:
> (1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;
> (2) Where in private practice he served as lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it;
> (3) Where he has served in governmental employment and in such capacity participated as counsel, adviser or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy;
> (4) He knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;
> (5) He or his spouse, or a person within the third degree of

relationship to either of them, or the spouse of such a person:
(i) Is a party to the proceeding, or an officer, director, or trustee of a party;
(ii) Is acting as a lawyer in the proceeding;
(iii) Is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;
(iv) Is to the judge's knowledge likely to be a material witness in the proceeding.

Thus, in these instances, a judge is obliged to disqualify him or herself regardless of the reasonable person test. *see id.*; *see also*, H.R. Rep. 93-1453, *supra* ("Subsection (b) of the amended statute sets forth specific situations or circumstances *when the judge must disqualify himself* . . . by setting specific standards, Congress can eliminate the uncertainty and ambiguity arising from the language in the existing statute and will have aided the judges in avoiding possible criticisms for failure to disqualify themselves.") (emphasis added).

Because recusals attack the essence of our legal system--the impartiality of a judge-- they are a serious matter. Indeed, judges faced with a possible recusal situation must go through an extensive analysis of the surrounding circumstances prior to issuing any decision on the matter. Moreover, **such decisions must be predicated on compelling evidence rather than mere allegations or conclusory facts**. Balistrieri, *supra* at 1220 ("Disqualification of a judge for actual bias or prejudice is a serious matter, and it should be required only when the bias or prejudice is proved by compelling evidence."); Sexson, *supra* at 477 ("the judge makes the disqualification decision considering a truthful and thorough examination of the relevant facts and circumstances, not merely those contentions and innuendos played out by counsel"); Taylor v. O'Grady, 888 F.2d 1189, 1201 (7th Cir. 1989) (holding that a judge's remarks were not "compelling evidence" and "too inconsequential to mandate disqualification").

## C. BLANKET RECUSALS

There have been circumstances when parties before the Court have requested blanket recusals of immigration judges. Blanket, or broad disqualifications of a judge should be carefully considered, since the compelling evidence standard dictates that judges examine and analyze each case *individually* to make a determination that disqualification is required. *See* In re Acker, 696 F. Supp. 591 (N.D. Ala. 1988) (rejecting a broad recusal order on all government cases and instead deciding that "case-by-case" analysis was more consistent with applicable case law); El Fenix de Puerto Rico v. The M/Y Johanny, 36 F.3d 136 (5th Cir. 1994) (remanding the case because recusals require a sufficient factual basis). Indeed, broad recusals should only be considered in those circumstances in which the statute mandates automatic disqualification. *see* 28 U.S.C. § 455(b).

## IV. PROCEDURES FOR RECUSAL

A judge has an obligation not to recuse himself or herself based upon mere allegations or threats. Therefore, all requests for recusal shall be made on the record, or filed in writing, and supported by specific reasons why recusal is warranted.

### A. PRIOR TO THE HEARING

If, at any time prior to the hearing, an immigration judge issues a decision on a recusal matter, he or she must render it in writing and serve it upon the parties to ensure that the parties have sufficient notice that their hearing will be rescheduled with another immigration judge. The written decision must contain a well-reasoned opinion explaining the circumstances and legal reasoning behind either the grant or the denial of the recusal. Moreover, the judge must issue a written decision in every case, regardless if the recusal was sua sponte or predicated upon a motion by one of the parties. Simple form or blanket orders will not suffice unless the immigration judge had a role in the case as a DHS attorney or private attorney. In that case, the order shall simply state that the immigration judge had a role in the case as a DHS attorney or private attorney.

### B. DURING THE HEARING

There may be circumstances where the grounds for a recusal may not become apparent until the actual hearing. In these situations, the judge must go on the record and issue an oral decision describing the reasons behind the grant or denial of the recusal motion. The decision must contain a well-reasoned opinion explaining the circumstances and legal reasoning behind either the grant or the denial of the recusal.

## V. CONCLUSION

Recusals are a serious matter and judges, including immigration judges, should not recuse themselves from cases without first thoroughly analyzing the circumstances behind such a recusal. Moreover, since a judge has an equally important obligation not to recuse himself or herself arbitrarily, his or her recusal should be based upon compelling evidence indicating that his or her judgment would be compromised. This process is vital to ensure that parties are accorded a hearing with an impartial judge without encouraging the use of recusal as a method to forum or judge "shop."

If you have any questions regarding this OPPM, please contact Brenda O'Malley, Counsel to the Chief Immigration Judge, at (703) 305-1247, or your Assistant Chief Immigration Judge.

Michael J. Creppy
Chief Immigration Judge